No. 92-519

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

T. K. WETHERELL, Speaker of the Florida House of Representatives, PETER R. WALLACE, Chairman of the Reapportionment Committee of the Florida House of Representatives, LAWTON CHILES, Governor of the State of Florida, ROBERT A. BUTTERWORTH, Attorney General of the State of Florida, and JIM SMITH, Secretary of State of the State of Florida,

Appellants,

v.

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID and BROOKS WHITE and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Northern District of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state-enacted reapportionment plan violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it does not maximize the electoral opportunities of a class of minority plaintiffs, notwithstanding that the plan provides the minority class with the opportunity to elect representatives in numbers at least equal to the class's proportion of the population?

2. When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of noncitizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

3. May a federal court impose a reapportionment plan as a remedy for a Voting Rights Act violation without affording the State any opportunity to devise an acceptable remedial plan, especially when the court-ordered plan unnecessarily trenches on fundamental state policy choices?

4. Do core principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding?

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JURISDICTIONAL STATEMENT

Speaker T.K. Wetherell, Representative Peter R. Wallace, Governor Lawton Chiles, Attorney General Robert A. Butterworth and Secretary of State Jim Smith, in their official capacities, appeal from the final judgment of the three-judge United States District Court for the Northern District of Florida, dated July 2, 1992, holding that the reapportionment plan for the Florida State Legislature, Senate Joint Resolution 2-G, violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

OPINIONS BELOW

The July 17, 1992 opinion of the three-judge United States District Court for the Northern District of Florida in Nos. 92-40015-WS, 92-40131-WS, and 92-40220-WS ("July 17 Op."), holding that Senate Joint Resolution 2-G violates Section 2 of the Voting Rights Act, has not yet been reported, and appears in the appendix hereto at 7a. The May 29, 1992 opinion of the three-judge court

in Nos. 92-40015-WS, and 92-40131-WS, reapportioning districts for the United States Congress, has not yet been reported, and appears in the appendix hereto at 77a.

JURISDICTION

The judgment finding that Senate Joint Resolution 2-G violates the Voting Rights Act was entered on July 2, 1992. Appellants Wetherell and Wallace filed a notice of appeal to this Court on July 24, 1992. Appendix ("App.") 141a. Appellants Chiles, Butterworth and Smith filed a notice of appeal to this Court on July 29, 1992. App. 143a. This appeal is being docketed within 60 days of July 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.[1]

STATUTORY PROVISIONS INVOLVED

See appendix at 211a.

STATEMENT OF THE CASE

A. The State Reapportionment Process.

In the wake of the 1990 census, the Florida legislature established House and Senate committees, made up of members from both political parties and major ethnic groups in the State, to propose a plan for reapportionment of the state legislature.

Acutely conscious of their responsibilities under the Voting Rights Act, these legislators sought a plan that would protect the voting rights of Florida's minority populations and achieve a fair allocation of political power among the State's racial and ethnic groups.[2] Members of the Florida Caucus of Black State Legislators served on the committees, and played an active role throughout the

[1] Appellants do not seek relief from the judgment of the district court dated May 29, 1992, involving reapportionment of the Florida districts for the United States House of Representatives. To the extent subsidiary findings contained in the court's May 29 opinion and judgment form a basis for the court's July 2, 1992 order, appellants challenge those findings.

[2] Testimony of Peter R. Wallace, Tr. VII, 164, App. 202a.

redistricting process.[3] Hispanic representatives, including Representative Miguel De Grandy, the principal private plaintiff in this case, also served on the committees and played an active role.[4] Community groups and other interested organizations, including the Florida Chapter of the NAACP, participated actively as well.[5]

"[P]olitical considerations are inseparable from districting and apportionment."[6] Achieving a fair accommodation of the competing social and political considerations in Florida proved particularly difficult. The State's ethnic diversity, explosive population growth, complex political alignments, and a host of other political and regional pressures posed serious obstacles to creating a reapportionment plan that could command majority assent in the legislature. Despite these difficulties, on April 10, 1992, the Florida legislature adopted Senate Joint Resolution 2-G ("SJR 2-G"), the redistricting law at issue in this case.[7]

B. The State Reapportionment Plan.

SJR 2-G divides the State into 40 single member Senate districts and 120 single member House districts. Dade County posed by far the greatest redistricting challenge because it comprises substantial Hispanic, African Amer-

[3] Testimony of Representative Willie Logan (caucus chairman) Tr. VII, 73-77, App. 198a.

[4] Testimony of Representative Miguel De Grandy, Tr. IV, 21, 42-45, 50.

[5] Testimony of Leon Russell (Vice President, State Conference of the NAACP), Tr. III, 107-08; Tr. VII, 139 (expressing NAACP support for Dade County House redistricting in SJR 2-G, and noting NAACP participation in its drafting and implementation), App. 201a.

[6] *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)); *see also White v. Weiser*, 412 U.S. 783, 794-95 (1973).

[7] In this respect, the Florida legislature succeeded where other similarly situated state legislatures have not. *See Wilson v. Eu*, 4 Cal. Rptr. 2d 379 (S. Ct. 1992).

ican and Anglo populations (including distinct Jewish communities of interest), all living in close proximity in a densely populated urban area. In the last decade, Dade County's overall population grew by 19 percent.[8] The Hispanic population increased by more than 350,000 persons (or 64%), principally as a result of immigration from Cuba, Nicaragua, Columbia, Peru and other Latin American nations.[9]

The population of Dade County supports 6 Senate and 18 House districts.[10] Under SJR 2-G, Hispanics, who constitute approximately 50% of the voting age population in the County, will constitute a majority of the voting age population in 3 of the 6 Dade County Senate districts and 9 of the 18 Dade County House districts.[11] African Americans, who constitute approximately 18% of the voting age population, will constitute a majority of the voting age population in 2 of the 6 Dade Senate districts and 4 of the 18 Dade House districts.

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[8] Testimony of George Meier, Tr. V, 204.

[9] Testimony of Dr. Dario Moreno (expert witness for plaintiffs), Tr. II, 14, 18-19 ("Miami became a magnet for 400,000 Latin American refugees during the 1980s . . . the reason for it was the . . . existence of a large Hispanic enclave . . . in which Latin Americans felt they could come here without suffering the kind of language barriers and discrimination barriers they would suffer in other large U.S. cities"), App. 184a.

[10] The population of Dade County is 1,937,094. The ideal House district is 107,816. Thus, 17.94 House districts can be contained within Dade County. Technically, 17 SJR 2-G House districts are wholly contained within the Dade County borders. An eighteenth district is contained substantially within Dade County. *See* Testimony of George Meier, Tr. V, 203, 210, App. 186a.

[11] *See* P. Exh. 5 (SJR 2-G), App. 171a, 183a (setting forth percentages of Hispanic voters in districts in Dade County area).

There has been some dispute in this case whether the relevant geographic area for analysis was Dade County proper, or, as plaintiffs alleged, a somewhat larger "Dade County area" comprising House Districts 101-120. If this larger area provides the relevant frame of reference, the fact of proportional representation remains. Hispanic voting age population of this 20 district area is approximately 46.7%, App. 180a-182a, and SJR 2-G ensures Hispanic voters

The remaining five Dade County House districts contain Anglo voting age majorities, but one includes a substantial African American population and is represented in the House by an African American.[12] Another contains a Hispanic voting age population of 46%,[13] and, if Hispanic population in the district increases, could well become a Hispanic majority district.

C. Legal Challenges To The Plan

1. *State Court Proceedings.*

Voting Rights Act challenges were raised *first* in Florida Supreme Court proceedings reviewing SJR 2-G pursuant to Article III, Section 16(c) of the Florida Constitution.[14] SJR 2-G was submitted to the Florida Supreme Court for review on April 13, 1992, after legislative enactment on April 10, 1992, to determine whether it was legally "valid." The private plaintiffs in the instant federal proceeding ("the De Grandy plaintiffs")[15] participated in that proceeding, and contended that SJR 2-G was not "valid" because it diluted Hispanic voting strength in Dade County in violation of Section 2 of the Voting Rights Act.[16]

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an opportunity to elect candidates of choice in at least 9 of the 20 districts (45%).

[12] Wallace Testimony, Tr. VII, 164, App. 202a; Logan Testimony, Tr. III, 164.

[13] De Grandy Testimony, Tr. IV, 51, App. 185a.

[14] "(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment."

[15] Numerous private plaintiffs filed claims attacking SJR 2-G. They will be jointly referred to as the De Grandy plaintiffs.

[16] Their state court brief repeatedly argued that the Florida Supreme Court was required to adjudicate challenges under Section 2 of the Voting Rights Act. *See* Brief of Miguel De Grandy,

In its May 13, 1992, opinion, the Florida Supreme Court asserted jurisdiction over these Voting Rights Act claims. The court held that SJR 2-G "does not discriminate against minorities," "is a material improvement over conditions under the 1982 plan," "is not significantly less favorable to minorities than other proposed plans, and provides a substantial opportunity for minorities to influence elections and elect representatives of their choice." *In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 285 (Fla. 1992); App. 104a.

The Florida Supreme Court issued this ruling without prejudice to further consideration. In its May 13 order, the court retained jurisdiction, specifically invited interested parties to file "a petition in this Court alleging how the plan violates the Voting Rights Act" and provided for "expedited disposition" after a full evidentiary hearing. *Id.* at 285-86. No party availed itself of this opportunity.[17]

2. *Federal Pre-trial Proceedings.*

One month later, on June 18, 1992, the De Grandy plaintiffs sought to raise identical Section 2 claims against

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Et Al. In Opposition To Constitutionality of Joint Resolution 2G (filed April 24, 1992 in Fla. S. Ct. No. 79,674) at 9 ("This Court cannot fulfill its duty . . . unless it first finds that the plan meets the standards of the Voting Rights Act"); *id.* at 13 (court "must, in actuality, conduct both a Section 2 and a Section 5 analysis"); *id.* at 15 ("United States Constitution requires [Florida Supreme Court] to conduct a full Section 2 analysis on the basis of full evidentiary proceedings"); App. 168a.

[17] Five counties in Florida are subject to the preclearance requirements of Section 5 of the Voting Rights Act. Accordingly, SJR 2-G was submitted to the U.S. Department of Justice for preclearance on April 17, 1992. On June 16, 1992, the Department precleared SJR 2-G's reapportionment of the House of Representatives. The Department objected to the drawing of one district in SJR 2-G's reapportionment of the Senate. That district was in the Tampa area, and is not at issue in this appeal. Both the Florida Supreme Court and the court below issued orders implementing an identical "remedy" for the Section 5 Senate deficiency identified by the Department.

SJR 2-G in federal court. They did so by seeking to amend a complaint they had previously filed in federal court raising constitutional challenges to Florida's 1980 legislative districts.[18] Defendants moved to dismiss all Section 2 claims on the grounds of abstention and *res judicata*, in light of the Florida Supreme Court's May 13 ruling. App. 210a.

On June 22, 1992, the federal district court granted the De Grandy plaintiffs leave to amend. The next day, the United States filed a complaint alleging violations of Section 2 similar to those the De Grandy plaintiffs had previously raised with respect to Dade County.[19] The United States also moved for a preliminary injunction on June 25, 1992.

The next morning, June 26th, the district court denied the preliminary injunction motion, denied defendants' motion to dismiss, consolidated the United States' case with that of the De Grandy plaintiffs, and ordered trial to commence immediately that same day on both complaints. App. 204a; July 17 Op. at 14, n.9, App. 19a. Defendants were afforded no opportunity to take discovery to ascertain the factual basis for plaintiffs' allegations, to seek summary judgment, or to prepare a complete trial defense.

3. *The Federal Court Trial.*

a. *The liability phase.* The De Grandy plaintiffs' June 18 amended complaint alleged Voting Rights Act viola-

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[18] On the opening day of the 1992 legislative session—a session called in part to reapportion on the basis of the recently released 1990 census data—the De Grandy plaintiffs filed a complaint in federal court alleging that the legislative districts premised on the prior 1980 census had become malapportioned as a result of population changes, and seeking federal injunctive relief. That complaint was mooted by passage of SJR 2-G, which reapportioned the state legislature in conformity with constitutional requirements.

[19] The United States had been aware of SJR 2-G and of the litigation for several months. Indeed, defendants filed a third-party complaint against the United States in this action, and the United States moved to dismiss that claim on May 10, 1992. Furthermore, SJR 2-G had been submitted to the Justice Department for Preclearance on April 17, 1992.

tions in several Florida counties. The United States similarly alleged violations "in Dade County and elsewhere."[20] During opening statement, however, counsel for the United States expressly limited the claims of Hispanic vote dilution to Dade County.[21] Two days into trial, the De Grandy plaintiffs voluntarily dismissed all Hispanic vote dilution claims outside Dade County.[22]

Plaintiffs claimed additional Hispanic majority Senate and House districts could have been created in Dade County absent alleged "fragmentation" of Hispanic voters.[23] Plaintiffs attempted to show that voting in Dade County was racially polarized, that Hispanic voters in Dade County were politically cohesive, and that 4 Hispanic Senate districts (instead of SJR 2-G's 3) and 11 Hispanic House districts (instead of SJR 2-G's 9) could have been created in Dade County. Plaintiffs argued that the legislature's failure to enact alternative plans proposed by plaintiff De Grandy and plaintiff Reaves, which would have created the additional Hispanic districts, violated Section 2. These alternative plans, according to plaintiff Reaves, were designed "to maximize the majority-minority districts" in Dade County.[24]

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[20] Complaint of the United States, § 8.

[21] Tr. I, 51, 53, 101. In opening statement, and at trial, plaintiffs made allegations with respect to Escambia County as well. The Escambia County issues, which involved African American voters, did not proceed to a litigated judgment and are not part of this appeal.

[22] Tr. III, 8 (motion of counsel); Tr. III, 214 (oral ruling granting motion). *See also* July 17 Op. at 16, n.13; App. 21a.

[23] U.S. Complaint, Count I, ¶¶ 8(a), 8(c). The De Grandy plaintiffs' complaint made substantively identical allegations. *See* De Grandy Third Amended Complaint, Count VIII, ¶ 142.

[24] *See* Tr. II, 179 (testimony of Darryl Reaves); *see also* Tr. II, 184 ("you must create the maximum number of Hispanic districts in Dade County"); Tr. IV, 104.

Plaintiffs introduced two alternative plans during the liability phase of the proceedings. One was sponsored by plaintiff De Grandy, a Hispanic member of the House. Another was sponsored by plaintiff Reaves, an African American member of the House. With respect to Dade County, "the Reaves-Brown plan and the De Grandy plan are virtually identical." Tr. IV, 29 (testimony of plaintiff De Grandy).

Based on undisputed evidence that Hispanic voters could elect representatives of choice in numbers equal to the Hispanic percentage of the Dade County voting age population, defendants argued that Section 2 was not violated because SJR 2-G guaranteed Hispanic voters an opportunity to elect candidates of choice at least equal to that of other members of the Dade County electorate.[25]

Defendants also argued that plaintiffs' evidence substantially overstated Dade County Hispanic voting strength by counting noncitizens who are ineligible to register and vote. Defendants' unrebutted expert testimony showed that approximately 50% of the Dade County Hispanic voting age population were noncitizens, and that several districts in plaintiffs' alternative plans would not contain Hispanic voting age majorities once this citizenship factor was taken into account.[26] By failing to rebut this showing, defendants argued, plaintiffs had not carried their Section 2 burden of proof.[27]

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[25] Defendants raised this defense in motions for directed verdict, and in closing arguments, *see* Tr. III, 212, VII, 78-79. Defendants introduced evidence demonstrating proportionality. *See* Testimony of George Meier, Tr. VI, 210-11, App. 186a; Testimony of Representative Logan, Tr. VII, 98, App. 201a. Defendants also cross-examined plaintiffs' expert witnesses on this question. *See* Tr. III, 283; Tr. IV, 86; Tr. III, 245-249.

[26] Testimony of William DeGrove (expert demographer), Tr. VII, 23-24, App. 197a-198a; Defendants' Joint Exhibit 2, App. 206a. *See also* July 17, Op. at 33-34; App. 37a-38a.

[27] During trial, the district court repeatedly ruled "as a matter of law that the relevant inquiry in this case is voting age population." Tr. V, 40; *see also* Tr. V, 44 (same); Tr. V, 47 (court's ruling "means that citizenship is not important").

On the evening of July 1, 1992, after closing argument on the Senate portion of SJR 2-G, the court ruled that:

> The plaintiffs have shown that a fourth Hispanic district can be drawn in accordance with the *Gingles* standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a retrogressive effect upon Afro-American voters in Dade County. . . . Consequently, this Court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Tr. VIII, 53, App. 202a. After closing argument on the House portion of SJR 2-G, the court ruled that:

> under the totality of the circumstances the plaintiffs have shown a violation of Section 2 *in that the plaintiffs have shown that more than nine Hispanic districts may be drawn* without having or creating a regressive effect upon black voters in South Florida and in Dade County.

Tr. VIII, 82 (emphasis added), App. 203a.

b. *The remedial proceedings.* The remedial proceedings commenced at approximately 7 p.m. on July 1st—one hour after the liability judgment was entered. As the proceeding began, the De Grandy plaintiffs introduced a new proposed remedial plan "just hot off the press here about thirty minutes ago." Tr. VIII, 96-97 (statement of plaintiffs' counsel). That plan—which the court referred to as the "modified De Grandy plan"—had never been produced to defendants or the court. The United States had not previously seen, and did not endorse, the plan.[28]

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[28] Counsel for the United States stated that counsel for the private plaintiffs "has additional remedial alternatives that he wants to put before the Court that also may well meet the requirements of the Voting Rights Act. *I haven't studied them sufficiently to address that point*, but I leave it to him." Tr. VIII, 96 (emphasis added).

The modified De Grandy plan radically reshaped not only the boundaries of the eighteen disputed Dade County House districts but also the boundaries of all *thirty-one* House districts in South Florida. *See* note 46 *infra*.

The district court heard argument on the relative merits of the remedial plans before it, but refused to permit evidentiary submissions.[29] Plaintiff De Grandy—a previously sworn witness—argued from the podium that the modified De Grandy plan protected Hispanic voting opportunity better than did other remedial options, without substantial impairment of the state policies advanced in SJR 2-G. Those factual assertions were unsworn and not subject to cross-examination.

Less than three hours after the remedial hearing began, the court abruptly halted the proceedings and ordered implementation of the modified De Grandy plan. The court refused pleas from defendants, the NAACP, and *amici* representing Jewish voters to adjourn the proceeding to permit scrutiny of the modified De Grandy plan and consideration of other remedial options.[30]

On July 2, 1992, the court entered separate judgments with respect to the Senate and House portions of SJR 2-G. In the Senate judgment, the court ordered the implementation of the Senate portion of SJR 2-G. App. 4a. In the House judgment, the court held that SJR 2-G violated Section 2 by diluting Hispanic voting strength, and ordered implementation of the modified De Grandy plan as a remedy. App. 1a.

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[29] Tr. VIII, 98 ("We do not intend to hear any more evidence regarding plans"). Appellants objected to the remedial proceedings because they failed to provide any meaningful opportunity for adjudication of the critical issues at stake. App. 203a.

[30] Tr. VIII, 104. In view of the truncated nature of the remedial proceedings, the House defendants subsequently filed a motion for reconsideration. In their motion, the House defendants proffered some of the evidence they would have presented had they been given the opportunity, demonstrating partisan bias, unnecessary district reconfiguration and other flaws in the remedy adopted by the Court. *See* Motion for Reconsideration and Affidavits of George Meier and Kimball Brace attached thereto, July 2, 1992, App. 145a.

D. The Three-Judge District Court's Opinion.

On July 17, 1992, the three-judge court issued an opinion "that memorializes and explains the court's rationale for its July 2, 1992 rulings." App. 24a. The court sought guidance from this Court's opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986), despite uncertainty whether those standards applied to "a challenge to single member districts." App. 29a.[31]

Applying *Gingles*, the court held that both the Senate and House portions of SJR 2-G violated Section 2. The court did not address defendants' argument that SJR 2-G provided Dade County Hispanic voters electoral opportunity at least equal to the opportunity afforded other members of the Dade County electorate. Indeed the court appeared to find it irrelevant that SJR 2-G imposed no discriminatory harm on Dade County Hispanics because it fairly allocated political power among Dade County's many racial and ethnic populations. As Judge Vinson's concurring opinion explained:

> the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established *all requisites* of their Section 2 claims.

[31] The first *Gingles* factor requires a determination that the minority population is sufficiently large and geographically compact to permit the creation of single member districts where the minority can elect candidates of choice. The second *Gingles* factor requires a determination that the minority population is politically cohesive. The third *Gingles* factor requires a determination that, as a result of racially polarized voting, the white majority is usually able to defeat Hispanic candidates of choice. 478 U.S. at 49-50.

The district court noted that "the effect of proving these three [*Gingles*] preconditions is an open question" in the Eleventh Circuit. App. 30a.

App. 74a (emphasis added).[32]

The court attempted to harmonize its finding that the Senate portion of SJR 2-G violated Section 2, with its July 2 order implementing that portion of SJR 2-G unchanged. The court "explained" that, "while the plaintiffs . . . established a section 2 violation as to the four Hispanic [Senate] districts, any remedy . . . would violate Section 2 as to African Americans" by diluting their voting strength. Faced with this conflict, the court concluded, with respect to the remedy, that it was required to defer to the legislative judgment despite the violation. App. 63a, 66a. That "explanation" stands in stark contrast to the court's July 2 order, which held that "Florida's state senate districts . . . do not violate Section 2." App. 5a.

The court then explained its remedial order for the House. The court chose the modified De Grandy plan on the ground that it provided more assurance that the 11 Hispanic districts would be effective than did the remedial plan offered by the House defendants. The court based this conclusion on what it described as the "testimony" of plaintiff De Grandy during the remedial proceedings. App. 70a-71a.

[32] Notwithstanding the court's repeated rulings at trial that evidence of citizenship was irrelevant, *see* note 29 *supra*, the court's subsequent opinion addressed the "citizenship" issue at length. The court held that, because all 11 Hispanic House districts in plaintiffs' proposed alternative plan contained at least 60% Hispanic voting age residents "and, therefore, 'satisf[y]' the 65% rule, the court need not inquire further as to the Hispanic citizenship levels in each proposed district." July 17 Op. at 37 n.28; App. 40a. The "65% rule" relied on by the court is a rule of thumb used by courts in Section 2 remedial proceedings, once liability has been determined, to determine whether a proposed minority district will be effective. The rule is premised on a need for a super-majority of minority voters in a district to compensate for low voter turnout, low registration rates, and the younger age structure of minority populations. It is not a rule that has been used to establish whether the Act has been violated.

E. Prior Proceedings In This Court.

On June 26, 1992. Appellants applied to Justice Kennedy for a stay of the district court proceedings. The stay was denied.

On July 10, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 2, 1992 order. Justice Kennedy referred the application to the full Court. On July 16, 1992, a unanimous Court granted the stay. *See* Stay Order in No. A-32, App. 139a.

Notwithstanding this Court's stay order, on the evening of July 16, 1992, the district court issued an order requiring that candidate qualification for the 1992 Florida legislative elections be carried out in accordance with the modified De Grandy plan.

On the morning of July 17, 1992, Appellants applied to Justice Kennedy for a stay of the district court's July 16, 1992 order. That application was referred to the full court, and was unanimously granted on the evening of July 17, 1992. *See* Stay Order in No. A-51, App. 140a.

THE QUESTIONS ARE SUBSTANTIAL

I. THIS COURT SHOULD DETERMINE WHETHER A STATE-ENACTED REAPPORTIONMENT PLAN VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT BECAUSE IT DOES NOT MAXIMIZE THE ELECTORAL OPPORTUNITIES OF A CLASS OF MINORITY PLAINTIFFS, NOTWITHSTANDING THAT THE PLAN PROVIDES THE MINORITY CLASS WITH THE OPPORTUNITY TO ELECT CANDIDATES IN NUMBERS AT LEAST EQUAL TO THE CLASS'S PROPORTION OF THE POPULATION.

Section 2 of the Voting Rights Act protects against "denial or abridgement of the right of any citizen of the United States to vote." 42 U.S.C. § 1973(a). Because the right to vote can be abridged even if the ability to cast a ballot is preserved, Section 2 prohibits any electoral procedure that causes a class protected by the Act to "have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." *Id.* § 1973(b).

Though easily stated, this standard has proven difficult to apply. Members of this Court have repeatedly recognized that "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Thornburg v. Gingles*, 478 U.S. at 88 (O'Connor J. concurring, joined by Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.).[33] Congress has provided some guidance by expressly providing that Section 2 does not establish a right to proportional representation, 42 U.S.C. § 1973(b). Ultimately, however, the task of enunciating a standard for determining when members of a protected class have received "enough" legislative districts has fallen to the courts.[34]

In this case, the district court adopted a straightforward but plainly erroneous standard—the application of

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[33] *See also Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J. (now C.J.) dissenting from summary affirmance) ("the phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained"). *See also Chisom v. Roemer*, 111 S. Ct. 2354, 2375 (1991) (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

[34] Federal courts are in substantial confusion with respect to the proper standard for analyzing vote dilution challenges to single-member districts. *See, e.g., Solomon v. Liberty County of Florida*, 899 F.2d 1012 (11th Cir. 1990), in which the Eleventh Circuit *en banc* could not agree on how *Gingles* should apply. *See also Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992) (three-judge court) ("it is not entirely clear to what extent *Gingles* applies to . . . single-member districts"), *appeal filed*, 61 U.S.L.W. 3083 (July 21, 1992); *Nash v. Blunt*, Civ. No. 91-0840 CV-W-2, 1992 WL 105612 (W.D. Co. July 15, 1992) (three-judge court); *Quilter v. Voinovich*, Civ. No. 5:91 CV 2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992); *Growe v. Emison*, 782 F. Supp. 427 (D. Minn.) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 1557 (1992).

which urgently requires this Court's review. After comparing SJR 2-G to alternative plans designed to *maximize* the number of Hispanic districts in Dade County, the court held that SJR 2-G violated Section 2 "in that the plaintiffs have shown that more . . . districts may be drawn" than were drawn. Tr. VIII, 82. The court believed that this evidence proved a Section 2 violation because—once political cohesion and racially polarized voting are shown—Section 2 requires nothing more than a demonstration that additional districts could have been, but were not, drawn. As Judge Vinson explained in his concurrence, the district court believed that the three *Gingles* factors constituted "all requisites" of a Section 2 claim. App. 74a.[35]

The district court's standard effectively imposes a requirement of "maximization" because any failure to draw additional minority districts that could be drawn will violate Section 2 so long as racially polarized voting exists.[36] Applying that standard, the district court redrew the legislative map for more than a quarter of Florida's population. This extreme application of Section 2 in a case of such importance to the people of Florida warrants plenary review for at least three reasons.

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[35] *See Solomon v. Liberty County of Florida*, 899 F.2d 1012, 1017 (11th Cir. 1990) (*en banc*) ("proof of the three *Gingles* factors is both necessary, and, in this case, sufficient for a Section 2 vote dilution claim") (concurring opinion of Kravitch, J.). Judge Hatchett, who presided in the proceedings below, joined Judge Kravitch's opinion in *Solomon*.

[36] Some States have interpreted *Gingles* in precisely this way. In California, for example, special masters sought to "accommodate the interests of *every* functional, geographically compact minority group of sufficient voting strength to constitute a majority in a single member district" because that was the only way to "eliminate . . . any possibility of challenge[] under Section 2." *See Wilson v. Eu*, 4 Cal. Rptr. 379, 399 (Cal. S. Ct. 1992) (quoting special masters' report). *See also, Quilter v. Voinovich*, Civ. No. 5:91 CV 2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992) (three-judge court) (describing action of Ohio reapportionment commission), *probable jurisdiction noted*, 112 S. Ct. 2299 (1992).

First, the maximization concept that the district court derived from *Gingles* has surprisingly little relation to the relative population level of a group protected by Section 2, and is thus a poor indicator of whether the group has fair and equal electoral opportunity. For example, in a hypothetical 10-district jurisdiction with 100 voters per district (1,000 total voters), a group constituting 50% of the population (500 voters) could control up to 9 of the 10 districts, so long as their geographic dispersion was such that 9 districts could be drawn containing 51 members of the group (9 x 51 = 459).[37]

Such results cannot be justified by the text or purpose of the Voting Rights Act. The maximization standard has nothing to do with whether citizens have been allowed to vote or whether the members of a protected class have "had less opportunity than others to participate in the electoral process and to elect representatives of their choice."[38]

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[37] Similarly, depending on where minority voters live and how district lines are drawn, a group constituting only 38% of the population could control three of five legislative districts even when the minority must have at least a 60% majority in a district to ensure election of a candidate of choice:

D #	Group 1	Group 2	Total
1	0	20,000	20,000
2	0	20,000	20,000
3	12,666	7,334	20,000
4	12,666	7,334	20,000
5	12,668	7,332	20,000

In this hypothetical, Group 1 makes up 38% of the population in an area which is to be divided into five districts of 20,000 persons each.

[38] Indeed, this extreme understanding of *Gingles* drove the district court to the otherwise inexplicable conclusion that the Senate portion of SJR 2-G violated Section 2 by diluting Hispanic voting strength, but should nonetheless be implemented—unchanged—as the remedy for the Section 2 violation. The court found, in essence, that the rights of both Hispanic and African American voters had been violated because the number of Dade County districts for each group was not maximized—even though maximization of one group's voting power would detract from that of the other. In this situation,

Second, the district court's maximization standard conflicts directly with the judgment of Congress and this Court that the Voting Rights Act is a remedial statute whose use must be preceded by a finding that the right to vote has been denied or abridged. Discrimination must be destroyed root and branch. But, in the absence of discriminatory results, the remedial process of the Act cannot be employed. Therefore, a court must find discriminatory harm before concluding that the Act has been violated.

The authoritative legislative history of the 1982 amendments to the Act sets forth a series of factors, such as discriminatory electoral practices and past societal discrimination, that must be considered in determining whether the Act has been violated. S. Rep. No. 94-417, 28-29 (1982), *reprinted in* 1982 *U.S. Code & Admin. News* 177, 206. Similarly, in *Gingles*, all the members of this Court, without regard to other disagreements, recognized the importance of careful application of the so-called Senate factors to the facts at hand. Application of the maximization standard renders the factual analysis—and the finding of discriminatory effect itself—irrelevant.[39]

Moreover, in this case, the necessary finding of discriminatory harm could not be made, even though the district court found racially polarized voting. That is because SJR 2-G protects Hispanics' right to vote in future elections. As explained above, SJR 2-G ensures that nine of the 18 Dade County House districts will contain majority Hispanic voting age populations, and each of the

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the court believed, Section 2 was violated even though no remedy better than SJR 2-G could be implemented. The court specifically held that assuring equal electoral opportunity and a fair allocation of political power for *all* Dade County ethnic populations bore only on the choice of a proper remedy. App. 63a, 66a.

[39] 478 U.S. at 44-45; *id.* at 98-99 (opinion of O'Connor, J.). At least four Justices in *Gingles* expressly rejected the principle that "undiluted minority voting strength means the maximum feasible minority voting strength," *Gingles* 478 U.S. at 89 (concurring opinion)—and no other opinion in *Gingles* endorsed the principle.

nine seats will permit the Hispanic population to participate effectively in the political process. Approximately 50% of the voting age population of Dade County is Hispanic. A voting plan that provides effective proportional representation cannot simultaneously pose discriminatory bars to political participation. That conclusion is compelled by the holding in *Gingles* that the Act is not violated where minority voters in a district can consistently elect representatives of their choice in proportion to minority population levels in the district. *See Gingles*, 478 U.S. at 77 (Brennan and White, JJ.) ("persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters to elect candidates of their choice is not equal to that enjoyed by the White majority"); *id.*, at 102 (O'Connor, J., Burger, C.J., Rehnquist, J. (now C.J.), and Powell J.).[40]

Third, the decision below squarely conflicts with a recent ruling by a three-judge district court evaluating Missouri's 1992 state legislative reapportionment plan. *See Nash v. Blunt*, Civ. No. 91-0840-CV-W-2, 1992 WL 165162 (W.D. Mo. July 15 1992) (three-judge court).[41]

In *Nash*, the plaintiffs demonstrated political cohesion and polarized voting, and claimed a Section 2 violation because the State's plan did not draw all the minority districts that could have been drawn. The State of Mis-

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[40] In *Gingles*, the Court had the luxury of reviewing the outcomes of a number of elections conducted under the challenged plan and could find a pattern of consistent representation as a matter of historical fact. In this case, as in most cases, the court must project the likely outcomes of future elections. But that is only a matter of temporal perspective. The principle that consistent electoral success bars a challenge applies equally well where, as here, consistent electoral success can be easily forecast. Indeed, no plaintiff in the district court ever tried to contest the conclusion that the nine House districts in SJR 2-G are all "safe" Hispanic seats.

[41] The decision below also conflicts, at least in principle, with *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991) (three-judge court), *aff'd*, 112 S. Ct. 2296 (1992), and with a recent three-judge court decision in *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. May 1, 1992, *appeal filed*, 61 U.S.L.W. 3083 (July 21, 1992).

souri defended on the grounds that Section 2 does not require maximization of minority voting strength, and that the State's plan guaranteed minority voters the opportunity to elect candidates of choice in proportion to their population levels in relevant communities.

Nash held that "though the plaintiffs have proven more [minority] districts could have been drawn . . . this fact does not prove the . . . plan violates the Act." *Id.* at 7. The court noted that "[g]iven Congress' express statement that the Act does not require proportional representation, we do not believe Congress intended the Act to require maximum representation." *Id.* at 6. The court also held that proof of "persistent proportional representation" should defeat a Section 2 vote dilution claim. *Id.* at 7; *see also id.* at 16 (Sachs, J., concurring) (no Section 2 violation because "a contrary ruling would force redistricters to grant more than proportional representation" to minority population).

A proper understanding of Section 2 compels the conclusion that the *Nash* court is correct and that the court below is in error on this fundamental point. As demonstrated, when a reapportionment plan provides members of a protected class with an opportunity to elect representatives of their choice in numbers at least as great as the group's proportion of the relevant population, that plan presumptively cannot afford the protected class "less opportunity than other members of the electorate to . . . elect representatives of their choice." 42 U.S.C. § 1973(b).

In SJR 2-G, the Florida Legislature sought to achieve a fair allocation of political power among Dade County's diverse, and often contentious, ethnic and racial populations. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 167 (1977) (opinion of White, J.). To that end, SJR 2-G ensures Hispanic voters in Dade County an opportunity at least equal to that of other members of the electorate to participate in the political process and

elect candidates of choice. The Voting Rights Act cannot reasonably be interpreted to require more.[42]

II. THIS COURT SHOULD DETERMINE WHETHER THE DISTRICT COURT'S RELIANCE ON THE VOTING AGE POPULATION RATHER THAN ON THE ELIGIBLE VOTER POPULATION TO DETERMINE THE NUMBER OF HISPANIC-MAJORITY DISTRICTS WHICH COULD HAVE BEEN DRAWN IN THE DADE COUNTY AREA WAS ERRONEOUS.

This case also raises substantial, unresolved questions respecting whether, and to what extent, Section 2 plaintiffs are permitted to demonstrate the violation of their voting rights by relying on the presence of others who, unlike the plaintiffs, are ineligible to vote. Because Section 2 claims often involve minority groups with significant numbers of noncitizen immigrants (who are generally ineligible even to register to vote), the need for a clear standard is manifest.

[42] Once a reapportionment plan has been shown to provide a minority population with "equal opportunity" in this sense, Section 2 permits a State to pursue legitimate state policies, including political balance, *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973); *Davis v. Bandemer*, 478 U.S. 109, 129 n.10 (1986), "respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and ensuring representation for communities of interest, *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). *See generally Houston Lawyers Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991). Nothing in Appellants' argument would treat as illegitimate a decision to create more minority districts than are required by Section 2.

For similar reasons, the district court's makeweight conclusion that SJR 2-G constituted "intentional discrimination" by preserving two incumbent seats is clearly erroneous both factually and as a matter of law. SJR 2-G has no discriminatory impact on Dade County Hispanics; the plan increases the number of Hispanic House districts from 7 to 9 and provides for at least proportional representation. Even if not every possible Hispanic district was drawn, many legislative choices in SJR 2-G favored Hispanic residents. As a matter of law, this evidence cannot support an inference of intentional racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55, 72 and n.17 (1982) (plurality opinion).

Under *Thornburg v. Gingles*, a plaintiff must demonstrate that additional districts could have been drawn that would cure the alleged vote dilution. 478 U.S. at 47-52, nn.15, 16. This necessarily requires a court to define the population that is relevant to Voting Rights Act claims.

In this case the plaintiffs based their claim that additional Hispanic districts could have been created on the total Hispanic voting age population of Dade County. Defendants then introduced evidence showing that half of the Hispanic voting age population of Dade County are noncitizens[43] to contend, quite simply, that the presence (or absence) of persons ineligible to vote cannot have any bearing on whether the right to vote of eligible persons has been violated.

Plaintiffs made no effort to rebut this evidence. Instead, effectively conceding that they could not prove their case if citizenship were taken into account, plaintiffs argued that requiring a showing of voting strength based on eligible voters "cannot be the law in this country." Tr. VIII, 69 (statement of counsel for the United States). The district court agreed, ruling that "as a matter of law . . . the relevant inquiry . . . is voting age population," and that "citizenship is not important." Tr. V, 40, 47.

It is well established, however, that Section 2 vote dilution claims must be based on estimates of eligible minority voters. *See Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031

[43] Defendants introduced the expert demographic testimony of William DeGrove showing that substantial portions of the voting age Hispanic population consisted of noncitizens. Based on standard court-accepted bivariate regression analysis and recently released U.S. census data on Dade County citizenship levels, DeGrove adjusted voting age population figures for plaintiffs' districts on a district-by-district basis, and determined that Hispanic eligible voter levels fell below 50% in 8 of 11 of plaintiffs' proposed Hispanic majority districts. DeGrove Testimony, Tr. VII, 5-24, App. 187a-198a.

(1989); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989). Indeed, on its face, Section 2 protects against "denial or abridgement of the right of *any citizen of the United States*," 42 U.S.C. § 1973(a) (emphasis added), and, therefore, the presence or absence of noncitizens can have no effect on the right of citizens to participate in the electoral process.

It is doubtless for this reason that, upon reflection, the district court's subsequent July 17 opinion offered a different rationale for its result. The court first noted plaintiffs' expert testimony showing that one district with a 59% Hispanic population had elected a Hispanic candidate, and then noted defendants' expert demographic testimony documenting that most of plaintiffs' proposed districts did not contain majority Hispanic *citizen* voting age populations. The court then concluded that it need not resolve the evidentiary conflict: "because each of the [plaintiffs' 11 proposed] districts contains a 60% Hispanic VAP and, therefore, 'satisfies' the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district." App. 40a. In so holding, the court confused the manner of finding liability with the manner of remedying established violations.

The "65 percent rule" cited by the district court is a benchmark for drawing effective minority districts in a *remedial plan*. *See Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). To account for a minority community's generally younger median population age, lower voter registration patterns, and lower voter turnout, the "65 percent rule" suggested that remedial plans should draw districts containing a 65% minority population to assure their effectiveness. *Id.* at 1415. Where, as here, voting age population figures are used, the number drops to 60% because median age differences are reflected in the voting age statistics. The district court's reliance on this remedial rule to *resolve* a Section 2 challenge warrants review for at least four reasons.

First, by using the "65 percent rule" as a presumption for establishing Section 2 liability, the district court's ruling conflicts with the clear weight of federal authority. In *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497 (7th Cir. 1991), for example, the Seventh Circuit explicitly rejected the validity of any such rule as a tool for evaluating a Section 2 vote dilution challenge. *Id.* at 503. Similarly, in *Magnolia Bar Ass'n, Inc. v. Lee*, Civ. No. J90-0413, 1992 WL 164580 (S.D. Miss. July 15, 1992), the court also rejected the applicability of this rule: "The 65 percent guideline does not factor into a Section 2 determination of liability." *Id.*, slip op. at *6. *See also Nerch v. Mitchell*, 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992); *Harrison v. Pennsylvania Legislative Reapportionment Commission*, Civ. No. 92-6063, 1992 WL 95090 (E.D. Pa. April 21, 1992); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 592 (E.D. Va. 1988), *appeal dismissed*, 927 F.2d 596 (4th Cir. 1991). *But see Illinois Legislative Redistricting v. LaPaille*, 786 F. Supp. 704, 714-15 (N.D. Ill. 1992) (three-judge court). As these courts recognized, the "65 percent rule" comes into play only *after* a plan has been found to violate Section 2; it does not establish whether Section 2 has been violated.

Second, the 60% figure is not a useful—much less determinative—guide to whether a group has equal electoral opportunity. As the example in footnote 37 *supra* illustrates, it is possible for a group with 38% of the population to constitute 60% of the population in three of five districts.

Third, the district court's ruling conflicts with the command of *Gingles* that plaintiffs prove Section 2 vote dilution claims with district-specific evidence. Vote dilution challenges require an "intensely local appraisal," *Thornburg v. Gingles*, 478 U.S. at 78 (quotation omitted), and, as this Court made clear, "courts must not *rely* on data aggregated from all the challenged districts." 478 U.S. at 60 n.28 (emphasis in original).

Fourth, *Ketchum v. Byrne* made clear that—even in the remedial context— the "65 percent rule" is merely

a judicial device to be used when actual data is unavailable. 740 F.2d at 1415. *Accord Nash v. Blunt*, slip op. at *8. Here, defendants introduced actual data demonstrating that eligible Hispanic voting age population would constitute a majority, and would be able to elect candidates of choice in only 3 of the 11 districts proposed by plaintiffs. Thus, even if the "65 percent rule" were a proper guide to determining liability—and it is not—it would not suffice in this case. The district court's refusal to consider Appellants' actual data effectively elevated the "65 percent rule" into an irrebuttable presumption of liability."[44]

III. EVEN IF THIS COURT DETERMINES THAT THE LOWER COURT'S LIABILITY FINDINGS SHOULD NOT BE DISTURBED, THE REMEDY IMPOSED BY THE DISTRICT COURT SHOULD STILL BE VACATED.

The remedial proceedings also present substantial questions warranting plenary consideration or summary reversal.

The district court's decision conflicts directly with *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981), and *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). As these decisions make plain, "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *McDaniel*, 452 U.S. at 150 n.30 (quoting *Wise*, 437 U.S. at 539). After finding an existing plan invalid, a court must "give the legislature an opportunity

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[44] A presumption establishes a rule that "the establishment of fact B is sufficient to satisfy a party's burden of producing evidence with regard to fact A." McCormick, *Evidence* § 342 at 965 (1984). Accordingly, "a presumption is rebutted upon the introduction of evidence which would [directly] support the non-existence of the presumed fact." *In re Yoder Co.*, 758 F.2d 1114, 1119-20 (6th Cir. 1985) (quotation omitted). Once rebutted, a presumption has no evidentiary effect. *See id. Cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

to devise an acceptable replacement before itself undertaking the task of reapportionment." *Id.* In this case, the district court never gave Appellants that opportunity. Instead, the court summarily ordered imposition of the modified De Grandy plan.[45]

The district court's remedial order also conflicts with *Upham v. Seamon*, 456 U.S. 37 (1982). As *Upham* makes clear, core principles of federalism require that a "district court's modifications of a state plan [be] limited to those necessary to cure any constitutional or statutory defect," 456 U.S. at 43, and must "defer to the legislative judgments the [original] plan[] reflect[s] *to the maximum extent feasible*." *Id.* at 40-41 (emphasis in original); *see also White v. Weiser*, 412 U.S. 783, 795 (1973). Thus, a federally imposed remedy must leave state-drawn districts in place to the maximum extent consistent with an effective remedy.

The remedial order imposed by the district court flies in the face of these principles. To create two additional Hispanic majority districts in Dade County, the modified De Grandy plan substantially reconfigures all *31* House districts in South Florida. The remedial plan reaches far beyond Dade County, and reshapes districts in areas that were not at issue in this case and for which no evidence of a Section 2 violation was submitted.[46]

The court's remedial order also trenches unnecessarily on a host of other important state policies. By altering the boundaries of House districts far beyond the area of the alleged Section 2 violation, the remedial plan unnecessarily ignores the important traditional boundary between Dade and Broward counties, and other traditional

[45] This Court has noted probable jurisdiction in *Voinovich v. Quilter*, 112 S. Ct. 2299 (1992), which raises similar questions with respect to the federal court's remedial authority.

[46] *See* Affidavit of George H. Meier, July 2, 1992, at 2, Exhibit 2 to House Defendants' Motion For Reconsideration. App. 152a-153a. Maps have been lodged with the Clerk of the Court which illustrate the differences between SJR 2-G and the modified De Grandy plan.

political divisions that SJR 2-G sought to preserve.[47] The plan fractures traditional Jewish communities of interest in the Dade County area that SJR 2-G was careful to preserve.[48] The plan also has significant adverse consequences for African American voters, many more of whom will be submerged in Hispanic majority districts under the court's plan. Finally, the plan amounts to a partisan gerrymander that significantly changes the political balance in the State.[49]

Furthermore, the district court's remedial proceeding was so irregular that summary invalidation is warranted irrespective of whether this Court concludes that the case presents issues warranting plenary consideration. Appellants were afforded no opportunity to evaluate the plaintiffs' proposed remedial plan prior to the proceeding, and thus had no basis for demonstrating at trial the extent to which the modified De Grandy plan jeopardized the state objectives embodied in SJR 2-G.

The court's remedial "findings," moreover, lacked any evidentiary support. Though the court concluded that the modified De Grandy plan minimized disruption of legitimate state policies, that conclusion rested entirely on what the court described as the "testimony" of plaintiff De Grandy. App. 154a. During the remedial proceedings, however, Representative De Grandy did not testify; his statements were unsworn and were not subject to cross-examination. Thus, his "testimony" was not evidence and could not provide a proper foundation for the district court's remedial ruling.

For these reasons, summary reversal of the district court's remedy is required.

[47] *See* Logan Testimony, Tr. VII, 81-84, 89-90, 93-94; Wallace Testimony, Tr. VII 165, 166 ("the sentiment on both sides of that county line was to try to respect the integrity of that boundary").

[48] *See* Tr. VIII, 118-121 (statement by counsel for *amici* with respect to the effect of plaintiffs' proposed remedies on traditional Jewish communities).

[49] Affidavit of Kimball Brace, July 2, 1992, Exhibit 1 to House Defendants' Motion for Reconsideration, App. 154a-156a.

IV. THE DISTRICT COURT'S REFUSAL TO ABSTAIN CONFLICTS WITH THE RECENT RULING OF A THREE-JUDGE COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, WHICH ABSTAINED UNDER CIRCUMSTANCES IDENTICAL TO THOSE PRESENT HERE, AND RAISES IMPORTANT ISSUES OF FEDERALISM AND STATE SOVEREIGNTY.

The district court declined to abstain from deciding plaintiffs' Section 2 challenges to SJR 2-G, notwithstanding that the De Grandy plaintiffs: (i) raised the identical claims first in a proceeding before the Florida Supreme Court and demanded that the court take jurisdiction over the claims; (ii) obtained the ruling they requested; and (iii) ignored the state court's offer of further consideration after a full evidentiary hearing.

The district court's ruling on the abstention issue, which was never explained in any written opinion, conflicts directly with a recent ruling of the three-judge United States District Court for the Northern District of California in *Members of the California Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992). In that case, a group of plaintiffs brought constitutional and Voting Rights Act challenges to California's redistricting plan. The same plaintiffs had also raised the same challenges in a concurrent proceeding before the California Supreme Court. The *Eu* court held that abstention was required, and dismissed the federal claims. 790 F. Supp. at 933.

This direct conflict is illustrative of widespread uncertainty as to the proper relationship between federal and state courts of concurrent jurisdiction adjudicating challenges to state reapportionment plans. The Court's decision to note probable jurisdiction in *Growe v. Emison*, 112 S. Ct. 155 (1992), also points up the need for guidance in this area.

A proper understanding of the demands of comity—as adumbrated in *Younger v. Harris*, 401 U.S. 37, 44 (1971), and its progeny—compels abstention here. In

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982), the Court established that *Younger* abstention is appropriate in deference to ongoing state civil proceedings that implicate important state interests and provide adequate opportunity to raise federal claims. *Id.* at 432.

In this case, the De Grandy plaintiffs expressly demanded that the Florida Supreme Court adjudicate their Section 2 challenges to SJR 2-G.[50] The Florida Supreme Court acceded; issued a ruling rejecting the claims; retained jurisdiction, and presented the opportunity for further consideration based on a full evidentiary record. Only after this unfavorable result did the De Grandy plaintiffs seek a federal forum.

A more unseemly, calculated affront is difficult to imagine. Under the circumstances, the State's interest in adjudicating the Voting Rights Act challenges to SJR 2-G raised by the De Grandy plaintiffs, which go to the core of state sovereignty, is plainly "so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil v. Texaco*, 481 U.S. 1, 11 (1987); *see also Scott v. Germano*, 381 U.S. 407 (1965) (per curiam).[51]

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[50] State courts—which have been given concurrent jurisdiction to determine Voting Rights Act claims—are fully competent to adjudicate any issues of federal law that may arise in challenges to legislative redictricting. *Hathorn v. Lovorn*, 457 U.S. 255, 265-70 (1982).

[51] A substantial question is also present with respect to whether the Section 2 claims of the De Grandy plaintiffs should have been barred by *res judicata*. The De Grandy plaintiffs were parties to the action in which the Florida Supreme Court ruled that SJR 2-G complies with Section 2. Under Florida law, the state supreme court's action precludes any further litigation of challenges to the plan. *See* Fla. Const. Art. III, § 16(d); *Florida ex. rel. Landis v. Thompson*, 163 So. 270 (Fla. 1935).

Indeed, the instant case is on all fours with *Growe v. Emison*, where the Minnesota Supreme Court provided an opportunity for consideration of Section 2 challenges to a reapportionment plan,

CONCLUSION

The Court should note probable jurisdiction of this appeal. In the alternative, the July 2, 1992 judgment of the district court should be summarily reversed.

Respectfully submitted,

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and the plaintiffs determined not to avail themselves of the opportunity. The preclusive effect of the Minnesota Supreme Court's ruling is one of the issues under plenary consideration in *Growe*.